IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO.12 OF 1990

Amritlal Ukabhai Padia & others. ...Petitioners.

vs.

Amritlal Gordhandas Jajal & others. ...Respondents.

Mr.Manoharlal Sharma i/b. Ms.D.P.Bosamia, for Petitioners.

Mr.Rajesh Shah, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 30th June, 2006.

P.C.:-

1. This petition is for revocation of probate granted by this Court in probate petition no.402 of 1987. The name of the testator is Chunibhai U. Padia. The present petition was filed by the step brother of Mr.Chunibhai U.Padia and it is being prosecuted by the legal representative of the step brother of the deceased testator Mr.Chunibhai U. Padia. By the Will which is probated, Mr.Chunibhai Padia has bequeathed his property to a public charitable trust. The first ground of challenge is that though Mr.Amritlal Ukabhai Padia who was the step brother of the deceased testator was entitled to be shown as an heir

of the testator in the probate petition, it was not done. The second ground is that full sister of the deceased testator who was disclosed as heir of the deceased in the probate petition and whose affidavit was filed in the probate petition giving consent to issue probate, was obtained by the Executor of the Will improperly. It is contended that the Will is not really a Will of the deceased testator. His signature on the Will has been forged and that the property which is mentioned in the Will was not really exclusively owned by the testator.

2. So far as the first ground is concerned, it is admitted position that when the testator died he left behind him a full Sister who was disclosed as heir in the probate petition. Rule 397 of the Original Side Rules framed by this Court obliges the applicant who is applying for probate of the Will to disclose the names of the heirs and next-of-kin of the deceased. In my opinion, while disclosing the names of the heirs, the petitioner who has applied for probate would be under an obligation to disclose the names of the heirs who are likely to inherit the property according to the personal law applicable to the testator. There cannot be an obligation to disclose the names of all possible heirs. For example if the testator has left behind the heirs belonging to Class-I in the Schedule to the Hindu Succession Act then it would be necessary to disclose the names of the heirs belonging to Class-I of the Schedule only because Class-I heirs take the property to the exclusion of heirs belonging to Class II. Similarly, Section 18 of the Hindu Succession Act shows that full blood heir is to be preferred to half blood heir. If there is an heir, though in the same class

but being full blood and others are half blood, it will not be necessary to disclose the name of the heirs with half blood if the relative belonging to same class of full blood is available and his name is disclosed. So far as the brothers and sisters are concerned, they are in class II and therefore, by operation of Clause 18 of the Hindu Succession Act the full sister will take preference over half brother and therefore, disclosure of name of full sister, in my opinion, will be compliance of Rule 397 of the Original Side Rules framed by this Court and therefore, the petitioners who had filed an application for probate were not under an obligation to disclose the name of Amritlal U. Padia who was the half brother of the testator. I find from the record that the citation was also published as required by the Rules on the notice board of this Court and the office of the Collector. On publication of this notice, if the deceased Amritlal U. Padia was keen on raising objection, it was open to him to raise objection pursuant to the public notice published. However, no such objection was raised.

3. So far as the ground that the affidavit of the full sister giving consent was obtained by the executor giving false picture is concerned, in my opinion, an objection in that regard can be raised by the full sister and not by the half brother of whom the present petitioners are legal representatives. In my opinion, this petition is not maintainable also for the reason that in the petition, the petitioners are setting up title which is adverse to the title of the testator. Perusal of the Will of which the probate is granted shows that the

testator was claiming to be exclusive owner of the property which is mentioned in the Will. In the petition, the petitioners are claiming that the testator was not the exclusive owner of the property and that the property was owned by the family. Therefore, in such a situation even if the half brother Mr.Amritlal Padia had filed a caveat during the pendency of the probate petition, that caveat would not have been entertained by this Court because he was disputing the claim of the testator to the property, and the remedy would have been to institute his own suit establishing title of his property. When the probate Court grants the probate in terms of the Will, the probate Court does not decide the title of the property. The grant of probate does not amount to declaring the testator as the owner of the property. Therefore, if it is the case of the petitioners that the testator was not the exclusive owner of the property, it is always open to them to institute their own suit and seek appropriate declaration. In my opinion, the petition is totally misconceived and is liable to be dismissed. It is accordingly, dismissed. The petitioners to pay cost of the petition to the respondents as incurred by the respondents. Inspite of disposal of the petition, interim order which is presently operating shall continue to operate for eight weeks.